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IN THE
Supreme Court of the United States

MARILYN ARONS, RUTH WATSON, AND PARENT INFORMATION CENTER OF NEW JERSEY, INC.,
Petitioners,

v.

OFFICE OF DISCIPLINARY COUNSEL OF THE SUPREME COURT OF DELAWARE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO THE SUBMISSION OF THE UNITED STATES AS AMICUS CURIAE

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SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO THE SUBMISSION OF THE UNITED STATES AS AMICUS CURIAE

Petitioners Marilyn Arons, Ruth Watson, and the Parent Information Center for New Jersey file this brief pursuant to Rule 15.8, Rules of the Supreme Court, to respond to the recommendation of the United States that this Court deny the petition for a writ of certiorari in this case, even though the United States concurs wholeheartedly with petitioners that the ruling of the Delaware Supreme Court is wrong on all counts:

* The United States agrees that the Individuals with Disabilities Education Act ("IDEA") confers on parents the right to have non-lawyer experts represent them in due process hearings held under the Act, and preempts inconsistent state law. U.S. Br. at 9-10 (setting forth the United State's interpretation of 20 U.S.C. § 1415(h)(1)).

* The United States agrees that permitting qualified non-lawyers to represent parents in IDEA due process hearings is crucial to the effective implementation of IDEA, pointing out that IDEA's representation provision is "a critical component of the Act's 'procedural safeguards.'" U.S. Br. at 10 (*quoting Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359, 369 (1985)).

* The United States agrees that the Delaware Supreme Court wrongly failed to accord any weight to the Department of Education's longstanding view that IDEA confers on parents a right to be represented by qualified non-lawyers in due process hearings, thereby disregarding this Court's deference doctrine. U.S. Br. at 12.

* And the United States agrees that the ruling of the Delaware Supreme Court "makes little sense." U.S. Br. at 11.

Nonetheless, the United States recommends that this Court deny the petition for a writ of certiorari because the Delaware Supreme Court is the first court to decide the question of whether IDEA creates a right of lay representation (*see* U.S. Br. at 12-14) and because the ruling, albeit in error, has "little national significance" because it affects only Delaware. *See id.* at 15. Neither of these reasons justifies denial of the writ.

1. We agree that the Delaware Supreme Court's ruling does not squarely create any judicial conflict. But the conclusion the United States draws from the lack of conflict is wrong; this case merits review now because the Delaware Supreme Court's ruling, coupled with the Third Circuit's ruling in *Arons v. New Jersey State Board of Education*, 842 F.2d 58, *cert. denied*, 488 U.S. 942 (1988), point other courts in one and only one misguided direction: to the conclusion that IDEA does not create a right of non-lawyer representation in IDEA due process hearings. The Delaware Supreme Court has emphatically so ruled. In reaching its conclusion, the Delaware Court relied heavily on *Arons*, in which the Third Circuit upheld a ruling forbidding non-lawyers from receiving statutory attorney's fees in IDEA proceedings because, in its view, IDEA does not create a right of non-lawyer representation. And now, it appears, Pennsylvania is following suit. *See* n.1, *infra*.

While these rulings do not create a *judicial* conflict, they create a conflict every bit as worthy of this Court's review. These rulings are in flat and irreconcilable conflict with the position of the Department of Education, which since 1981, "has interpreted . . . [IDEA §1415(h)(1)] to require States that receive funds under IDEA to allow qualified non-lawyers to represent parents at IDEA due process hearings." U.S. Br. at 10. This Court has often granted review in cases where the case law was clearly at variance with established federal regulatory policy, and this is just such a case.

2. Even more importantly, the United States is simply wrong to suggest as its other reason to deny review that the "practical significance of this case is not yet clear" because the decision below affects "just" Delaware.

First, the United States' "let's hope the sky doesn't fall in" approach is a not a sound reason to defer review. To be sure, it is not yet clear how many states will decide to follow Delaware's lead and forbid non-lawyers from representing parents at IDEA due process hearings. But Pennsylvania already has begun the process of amending its rules to bar non-lawyer representation and, no doubt, the lawyers advising other states know that this petition is still pending and will not act until this Court does.[1]

Moreover, as this Court has recognized time and again, the economic pressures imposed by IDEA on states are intense. *See, e.g., Cedar Rapids Community School District v. Garrett F.*, 119 S. Ct. 992 (1999). If states understand that they can

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[1] On August 8, 2000, less than one month after the Delaware Supreme Court's ruling, the Attorney General of Pennsylvania instructed the Department of Education to amend its rules to forbid qualified non-lawyers from serving in a representational capacity in IDEA hearings. *See* 30 Pa. Bull. 4628, 4630. On September 2, 2000, the Board of Education proposed a rule amendment "to make it clear that both under Federal statute and regulations and under State law, licenced attorneys only may represent parents in due process hearings." *Id.* The proposal repeals the existing rule, 22 Pa. Code §14.64(h), which provides that "[p]arents may be represented by any person, including legal counsel," and substitutes language that tracks that of IDEA § 1415(h)(1), to "clarif[y]" that non-lawyers "may not perform any functions that constitute the practice of law." 30 Pa. Bull. at 4629. *See generally,* Winnick, *Special Ed Rules Get State OK; But Critics Claim Revised Rules Remove Some Students' Safeguards,* C-1, Pittsburgh Post Gazette (Jan. 19, 2001).

dramatically decrease the number of IDEA due process hearings just by forbidding lay representation, as Delaware has done so successfully so far, the floodgates will soon open or, more precisely, the representation gates will soon close, as they are about to in Pennsylvania. The time to address this problem is now, not when thousands of parents nationwide are forced to confront the Hobson's choice now facing Delaware parents.

Second, the "just Delaware" argument overlooks the serious adverse impact that the ruling has and will continue to have in Delaware. According to the United States' statistics, 16,000 families in Delaware have children who qualify for assistance under IDEA. U.S. Br. at 15. The record here is clear: These 16,000 families have virtually no access to legal representation, *see* Pet. App. A49-51 (¶¶ 20-28), which, as the United States admits, likely explains the rarity of due process hearings in Delaware. Indeed, it appears that but for petitioners' assistance, there would have been no or virtually no due process hearings in Delaware during the relevant time-frame. Rather than suggest that the problem is "limited in scope" as the United States speculates (Br. at 15), these statistics only confirm petitioners' concern — fully supported by the stipulated record — that unless qualified non-lawyers are available to help parents in IDEA due process hearings, parents are likely to forego their right to a hearing because they are "intimidated by the formality and complexity of the due process hearing," they are not "familiar with the procedures used in due process hearings . . . or in legal proceedings," and they lack "the grounding in the technical issues" that lie at the "core of their disputes with the local school boards." Pet. App. A51 (¶¶27-28).

The final reason given by the United States to deny review is the hope that, although the Delaware Supreme Court issued its opinion nearly a year ago, and although this issue has

been percolating in Delaware since August 1996, the Delaware Supreme Court might change its rules to permit non-lawyer representation. The United States even speculates that it "is possible . . . that Delaware will, in the reasonably near term, either provide for the availability of free or low-cost legal assistance with IDEA hearings, or bring its law back into conformity with that of other states by adopting an appropriate express exception to its present legal practice rules." U.S. Br. at 17. Suffice it to say that nothing supports this panglossian prognostication. As to the United States' suggestion that Delaware might seek to provide legal assistance to parents in IDEA hearings, that is the United States' own invention — not even the Delaware Supreme Court went so far; it mentioned only the possibility of revising its unauthorized practice of law rules. And as to that possibility, the fact remains that almost a year has passed without any hint from the Delaware Supreme Court that the rulemaking mentioned in its opinion was anything more than a fig leaf to mask the harshness of its decision. No rulemaking or other sort of procedure has been initiated, and no signal has been given that one will be commenced. Empty promises are no substitute for enforceable rights.

CONCLUSION

For the reasons stated above and in petitioners' prior submissions, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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